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Supreme Court of the United States

OCTOBER TERM, 1949

No. 8[illegible]102

JAMES A. SULLIVAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 859

JAMES A. SULLIVAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Proceedings Below

The petitioner was convicted on May 17, 1948, in the County Court of Westchester County, of the crimes of (1) knowingly procuring or offering to be filed in the office of the County Clerk of Westchester County on June 4, 1945, a false and forged certificate of doing business under an assumed name (Penal Law § 2051), (2) of forging the name of C. J. Arnold to the same certificate (Penal Law § 887) and (3) of uttering the same forged certificate by the filing thereof (Penal Law § 881) (see *7-24, 124-128). The petitioner was sentenced on June 14, 1948, to a term of one year in the Westchester

* References are to folios of the printed record unless otherwise stated.

County Penitentiary on each count to run concurrently and in addition was fined the sum of $1,000 on the first count.

The conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department on June 20, 1949 (4048-4053, 275 App. Div. 956 opinion at 4060-4065). It was finally affirmed by an unanimous order and judgment of the Court of Appeals on March 3, 1950 (4069-4076, memorandum opinion at 300 N. Y. 696). On April 6, 1950, the Court of Appeals unanimously denied an application by the petitioner for a reargument or in the alternative to amend the remittitur so as to state a Federal question (300 N. Y. 739).

The petitioner is presently serving his term and in the ordinary course will be discharged on or about September 14, 1950.

Nature of Case and Questions Presented

James A. Sullivan, the defendant, was the Vice-Mayor of the City of Yonkers, New York, and a member of its Common Council in June of 1945. Arthur Arnold was a bookmaker, who occupied a room in premises controlled by the defendant and who needed an extra telephone for that illegal business. Wartime restrictions required that telephone service be given only to legitimate businesses, and the telephone company required evidence of a going concern, registration papers, and a bank account. The defendant forged the fictitious name of "C. J. Arnold" to a certificate of doing business under the assumed name of Maritime Oil Company, and caused it to be filed in the office of the County Clerk of Westchester County on June 4, 1945, and also opened a bank account for the Maritime Oil Company, to induce and procure the installation of the telephone for the bookmaker.

The main question presented here is whether the failure of the trial court to disqualify himself deprived the petitioner of equal protection of the laws. Petitioner also claims that one of the witnesses for the People committed perjury and was an accomplice and that the use of such testimony brought about a conviction without due process and denied petitioner equal protection of the laws.

The petitioner in his petition and supporting brief has misrepresented and distorted the evidence before the trial court. It will be necessary, therefore, to review the evidence in order that the points involved may be judged in their proper light of the reasonable interpretation of the testimony and of the Jury's rejection of that interpretation which the petitioner puts upon the testimony.

The Evidence

The defendant, James A. Sullivan, had been a man of power and influence in the City of Yonkers from 1920 and was a member of its Common Council during the period 1944 to 1947 (2531-2547). An attorney had purchased for him as a business venture the controlling mortgage interest in premises known as the Labor Temple in the City of Yonkers as part of a plan to rehabilitate the premises for a possible resale (1070-1074). The interest was taken in the name of the attorney's secretary as a dummy for the defendant (People's Exhibit 32, 1013-1017). A friend of the defendant's, one William J. McGeory, had formerly been president of the holding corporation which had legal title to this building (1050-1053), but the taxes on the property had been in arrears since 1936 and an assignment of rents had been made giving the mortgagee the right to manage the premises (1058, People's Exhibit 34, 1011). In the purchase of the mortgage the defendant succeeded to all of the rights given by this assignment of rents. McGeory had no in-

dividual interest in the property (1091-1095). The actual control and management was in the hands of the defendant from October 1944 (1013-1017).

About this same time McGeory brought to this building a bookmaker by the name of Arthur Arnold and showed him a room in which Arnold might possibly work and have some phones (1340-1351). Two phones were installed on these premises on October 17, 1944 and the defendant came and facilitated their installation (492-503). This bookmaker from then until after the date of the forgery of June 4, 1945, was the tenant of the defendant Sullivan and not, as the brief of the petitioner has claimed, the tenant of McGeory (see petition at p. 3). Rents were collected by the "dummy" and turned over to the defendant Sullivan until foreclosure of the premises in July 1946 (1018-1025, 1118-1131).

In the spring of 1945 the bookmaker wanted an additional phone and spoke with the defendant and McGeory about getting a phone (1362). This meeting was staged because it was necessary for the defendant, the man with influence, to take the bookmaker to meet a telephone company representative (1368-1374). The defendant had previously attempted in other ways to obtain this telephone. He had written two letters, on February 24th, 1945 and again on March 26th, 1945 on stationery of the fictitious Maritime Oil Company to each of which the defendant had signed the name "S. P. Fisher" (338, 344, see People's Exhibits 10 and 11 at 3791, 3797). The first of these requested telephone service and the second gave additional information in the effort to obtain the telephone. The defendant had also twice called the district manager of the telephone company and asked him to expedite the installation of the phone (330-339).

During this time the matter of this application was referred by telephone to the district attorney's office on

April 13th, 1945, apparently to see if the persons were known, but no answer or report was received from the district attorney's office (421-425).

On April 26th, 1945 the defendant brought the bookmaker Arnold to lunch with a Mr. Prokop, manager of the local office of the telephone company (213-215). At this conference Mr. Prokop indicated that the telephone company would want evidence that the concern was operating, of a bank account, registration papers or anything similar and the defendant was present when this was made known (221, 222, 285-291, 309-318). The bookmaker testified that he had never seen the letters sent out on the stationery of the Maritime Oil Company and did not know a "S. P. Fisher" (1406, 1407).

John J. Balog was a clerk in the Coal company, who kept records, wrote letters and had worked in the same office for over ten years with the defendant who was some kind of a superior in the firm and who on occasion had given orders concerning his work to Balog (765-772). Balog was a low salaried man and the defendant had on occasion obtained extra clerical work for him which had stopped at the end of May, 1945 (859-865). Then on June 4th, 1945 the defendant Sullivan brought to Balog a certificate of conducting business under the name of Maritime Oil Company and at the defendant's request he signed his name as "J. J. Balog" on the original and two copies (787, 791). The defendant Sullivan said to Balog that a friend of McGeory's was going into business and that there was a chance for Balog to obtain some additional work (792). Balog did not know McGeory and had never talked to him (3319) but he had faith and full confidence in the defendant Sullivan and went along with what Sullivan asked him to do (870-871). Balog then, at the request of the defendant took these papers to the county clerk's office and brought certified copies back to the defendant (795, 872-878, 813-819).

On June 8th, 1945 a checking account was opened in the name of this fictitious Maritime Oil Company with a deposit of $1,000 in cash and the caption thereon was in the handwriting of the defendant Sullivan (1273-1277, 1663). Balog had also signed other papers for the defendant, and the telephone company application and a portion of the bank signature card were in his handwriting (800, 246, 906).

The defendant also hired Helen P. Balog, the wife of John J. Balog on June 11th, 1945, to work in a store at the premises controlled by him until the telephone was installed and she did remain there until a few days after the installation, during which time no business was done in the store and the only persons who came in were the defendant Sullivan, the telephone installer and an unknown man looking for business (914-935, 506-509).

This telephone of the Maritime Oil Company thus secured by the defendant and installed in the store on the ground floor was thereafter used by the bookmaker in his room on the third floor of the building (1385-1390). The wiring used to extend the phone was not material used by the telephone company (538).

After the City of Yonkers had acquired the premises after a tax lien foreclosure, a reporter for the local newspaper was making a survey of the progress in the conversion of the building for quarters for veterans and on February 12th, 1947 this reporter discovered the telephones and had then called the police (2439-2448).

The defendant admitted writing the name of "S. P. Fisher" on the letters of the Maritime Oil Company to the telephone company and also making the bank deposits and hiring Mrs. Balog to stay in the store to await the installation of the telephone but all of this he claims was done in reliance on authorization given to him by his

friend McGeory (2623, 2646, 2654). He denied writing the signature "C. J. Arnold" which was the forgery charged in the indictment (2487).

The defendant also admitted having in his hands the certificates and asking Balog to sign them with the hope of some work for Balog but again said that he had done this at the request of McGeory (2636-2643). The defendant also denied that he had given the certificate to Balog to file in the county clerk's office (2644). The People showed by competent handwriting experts, based upon authentic specimens of the defendant's handwriting, that the defendant had signed the forged signature (1494, 1989). The defendant also offered expert testimony to the effect the evidence was insufficient to indicate that the defendant had written the signature (2901-2933). The factual issue was settled by the verdict of the jury and is not an issue before this Court.

ARGUMENT

POINT I

The trial court was not disqualified by Section 14 of the Judiciary Law of the State of New York.

The trial judge had been district attorney prior to January 1, 1946. There is no disagreement on that fact but there is an unqualified denial that this judge had been counsel or attorney "in this case".

On page 2 of the petition a statement of fact is made that the trial judge as district attorney began an investigation and pursued it for nine months into the matter of this application for the phone by the Maritime Oil Company. All of the folios cited show clearly that the inves-

tigation was by the telephone company alone. There is one reference to Defendant's Exhibit F at 414 which would indicate that reports were made to the district attorney but this reference is a mistake in reading for the exhibit itself at 3941 shows very clearly that the report was made to the district manager of the telephone company and not to the district attorney's office.

This same argument was made by this counsel upon the oral argument to the Court of Appeals and he was questioned extensively about this folio reference and about the fact that they are set forth in such a manner as to misrepresent the record. He nevertheless repeats now the same argument despite the fact that twelve judges in the appellate courts of the State have unanimously held that this interpretation of the facts and this attempt to make the judge an attorney and counsel in the case, which did not exist until more than thirteen months after the trial judge ascended to the bench, is without merit.

Counsel for the defendant asked the district attorney to produce upon the trial a telephone company record of a call made to the district attorney's office, which apparently was an inquiry by the telephone company about a telephone of the Maritime Oil Company, on April 13, 1945 (422, 423). Apparently no answer was made by that office. It should be pointed out that at that time there was merely in existence two letters written to the telephone company bearing the two fictitious names of "C. J. Arnold," and "S. P. Fisher" and also the certificate involved in this indictment was not filed until June 5, 1945. There was no evidence that any record was made by anyone in the district attorney's office or any emphasis placed upon this telephone call and this is not surprising because it would be impossible for any office to have any information in its files about non-existent persons.

The defendant's counsel also asked the district attorney to produce Defendant's Exhibit "K" which referred to the fact that the district attorney's office had requested the name and address of the subscriber of the Ben Weiss telephone (2418)

The district attorney's office was never informed that this telephone was being used for bookmaking nor was there any indication that the district attorney had any proof at that time that the telephone was being used for such a purpose (2427). The petitioner has argued in his brief that this man Ben Weiss was known to the district attorney to be the other man who worked with the bookmaker, Arnold, but the district attorney's attempt to inquire into the identity of Ben Weiss in Yonkers was objected to by defendant's counsel at the trial (2452). All of the exhibits relating to any contact with the district attorney's office had been used in the councilmanic inquiry in Yonkers and all bear the exhibit number used in that hearing. That fact was brought out by the district attorney in the argument on this question.

Defendant's counsel moved the disqualification of the trial judge after the trial had been on for one week (732, 60) upon the ground that he was the district attorney in 1945 and that at that time his office was asked for information regarding the Maritime phone and also requested information regarding the Ben Weiss installation (748). It was not claimed at that time or at any time by the trial counsel that the trial judge had any knowledge personally about those matters. The district attorney pointed out that all of these exhibits and their contents were known to Mr. Bleakley, the trial counsel, before the trial started and they were a part, not only of the stenographic minutes but also of the police report, both of which were in defendant's counsel's hands before the trial started (751-752). The statement of fact was then made by the district attorney conducting the trial

that it could not be shown that the trial judge ever knew about any of these things (753). The motion to disqualify was denied and the court declined to make a statement on the record as to his lack of knowledge. It is submitted that as a matter of law the fact of these casual inquiries is not sufficient to disqualify the trial judge. There was no knowledge of bookmaking on his part in 1945 or on the part of anyone else in the district attorney's office. No information charging a crime was being prepared or was filed, nor were any proceedings shown to be then pending before the grand jury, and these exhibits which were used as the basis of the motion did not become known until 1947, more than one year after the trial judge became County Judge, and the telephone company records turned over to the Yonkers police. While these exhibits were in the possession of the district attorney at the trial they were not turned over to him until after they had been used upon the hearing in Yonkers (2417). Petitioner's attempt to charge that reports were made to the trial judge back in 1945 are supported by folio references which relate merely to the fact that they were in the possession in 1948 of the district attorney at the trial (383, 384, 2417). Particular reference is made to Defendant's Exhibit "K" which went to the office of the telephone company and not to the district attorney at that time (2436-2437).

Section 14 of the Judiciary Law insofar as pertinent here provides as follows:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested." • • •

The charges here were forgery and uttering of a forged instrument and the filing in a public office of the instru-

ment concerned. There is no claim that the facts concerning the forgery by the defendant and the use of the assumed business name certificate were known to anyone until after the police investigation started in February of 1947, more than one year after the trial judge had ceased to be the district attorney. Since the crimes charged were not under investigation prior to January 1, 1946, then the judge could not be disqualified (see *Musser* v. *Third Judicial District Court of Salt Lake County*, 106 Utah 373, 148 Pac. 2d 802, 803). The indictment was not voted until November 20, 1947 (25).

Since there was not during 1945 any action taken in the name of the People against the defendant or anyone else involved in this case, there was not at any time while the trial judge was district attorney any "action, claim, matter, motion or proceeding" in which he was or acted as attorney or counsel within the provisions of Section 14 of the Judiciary Law. There is no "claim" here and the other words relate strictly to judicial proceedings or actions, either civil or criminal, and since there were none the court is not disqualified as a matter of law (see *Keefe* v. *Third National Bank*, 177 N. Y. 305).

Trial counsel conceded that the judge had no personal knowledge—compare this to petitioner's claim of an investigation directed by him.

> "Ladies and Gentlemen: In this part of my summation, among other things, I am going to discuss the District Attorney's Office in 1944 and 1945, and I think it only fair to tell you that the District Attorney in 1944 and 1945, was his honor, Elbert T. Gallagher. *I do not claim and will not claim that Judge Gallagher had any knowledge* of the things I am going to call to your attention, but in fairness to myself and in fairness to the defendant, I think I should say to you that when this situation began to

develop early in the trial I did not realize that Judge Gallagher had been District Attorney at that time. As soon as I did realize it I called the facts to his attention and Mr. Fanelli's attention, and I asked Judge Gallagher to disqualify himself. It was his prerogative to do so or not. He did not do so. As I say, and I want to make it perfectly clear, I make no accusation against Judge Gallagher, but I definitely am going to call the facts, the undisputed facts here to your attention" (3415, 3416). (Italics supplied.)

It cannot be claimed that the trial judge is interested within the meaning of the Judiciary Law. He obviously has no longer any connection with the district attorney's office, and mere former association is not the concrete type of interest contemplated by the statute. The judiciary law contemplates such a direct interest as is illustrated in *People* v. *Ibey,* 121 Misc. 286, where the judge at the time of the trial was an employee of the company which owned the stolen truck which was the very subject of the larceny charge being tried.

The instant case is to be distinguished in every respect from the situation presented in cases cited by petitioner. An analysis of two of them would illustrate this difference. *People* v. *Haas,* 105 App. Div. 119, reversed an order denying a motion to remove the trial to the Supreme Court. In that case, the County Judge had prior to his election, consulted with the accomplice of the defendant and had also interviewed the defendant in jail while the indictments were pending. The defendant, in his affidavit, claimed that he had considered the Judge as counsel in his own case. *McLaren* v. *Charrier,* 5 Paige Ch. 530, is cited by the petitioner at page 15. It involved a master who had represented a party and an examination of the report shows that this was not another case

but a supplemental bill and a continuation of the same case in which the master had previously acted as counsel and had assisted in preparing papers in the case.

We will not burden the court with an analysis of every case cited, but none of them refer to any situation similar to the instant case. Most of the cases cited by petitioner at pages 15 and 16 may be found as footnotes to the discussion at 48 *Corpus Juris Secundum*, page 1067, and relate chiefly to situations in which the judge, while prosecuting attorney, had actively participated in the investigation or had signed the indictment or information under which the defendant was charged in the trial before him.

Although both the defendant and his attorney were in possession of the complete stenographic minutes of the hearing in Yonkers where all of these telephone company records were produced prior to the opening of this trial before the County Court, the defendant's attorney was not apprehensive that he might not receive a fair trial, for he did not attempt to move under Section 344 of the Code of Criminal Procedure to remove the case to the Supreme Court for trial because the judge was biased or prejudiced.

It may be wondered, however, why trial counsel who conceded that the judge had no knowledge of these facts discussed them at such length before the jury. He did so solely in an attempt to divert attention from his own client and to make a baseless and despicable charge that the alleged inaction resulted from bribery by the bookmaker of the sheriff or the district attorney (3420).

The trial court, therefore, is not disqualified under the provisions of Section 14 of the Judiciary Law because no court action or proceeding was pending against the defendant while the Court had been district attorney and neither is there shown any personal bias or prejudice which would prevent a fair trial.

POINT II

The claimed perjury was merely a correction of an obvious mistake and was not an impeachment of the witness.

The witness John J. Balog had testified on direct examination that at the request of the defendant he took to the county clerk's office and filed there the original certificate of conducting business under an assumed name, and also that he returned two certified copies to the defendant. On cross examination he gave further details of the route he took and the particular building in which the office was located (872-878). Cross examination then brought up the details of an interview had by the witness Balog with the district attorney, Mr. Fanelli, prior to the appearance of the witness before the Grand Jury. According to stenographic records, the witness testified as follows:

> "Q. Mr. Fanelli, in the presence of your lawyer, yourself and your wife, talked to you about the filing of these exhibits in White Plains? A. He did.
>
> Q. Do you recall what he said to you on that subject? A. He gave me the information that I filed it" (882).

If this testimony were in fact given by the witness it would contradict all of his direct testimony relating to the filing of the instrument which was the subject of the indictment, and all of the other details given by him on cross examination. The record does not show that the defendant's attorney seized upon this apparent contradiction or followed up any line of questioning to enlarge upon this statement. The following day, as a part of the re-direct examination of this witness, his attention was directed to the answer which the record showed he had given. He was plainly surprised that the record did

show such an answer and expressed his surprise in a rising tone and appropriate inflection which is reflected in the record by the question mark at folio 957. The complete context of the questioning on this point, is as follows (954):

"Q. Yesterday on cross-examination Mr. Bleakley asked you about conversations between you, your lawyer Mr. Hand and myself prior to your appearance before the Grand Jury; do you remember that? A. Yes, I do.

Q. What questions were asked you about that subject? A. Did I at any time talk to you before I testified before the Grand Jury?

Q. I do not want you to repeat them, but you do recall Mr. Bleakley asking you some questions as to what I said to you before you appeared before the Grand Jury? A. Yes, I believe he did ask me something about—

Q. Do not state the question; do you remember the subject matter which was discussed on your cross-examination by Mr. Bleakley when he questioned you about that yesterday? A. Yes, something about my testimony.

Q. Yes; yesterday morning or yesterday afternoon Mr. Bleakley asked you this question: 'Q. Mr. Fanelli, in the presence of your lawyer, yourself and your wife talked to you about the filing of these exhibits in White Plains? A. He did'; do you recall that? A. Yes.

Q. And then was this question put to you yesterday: 'Q. Do you recall what he said to you on that subject'— Do you remember that question? A. Yes.

Q. And did you give this answer: 'A. He gave me the information that I filed it'; do you remember making that answer? A. That you gave me the answer that I filed it?

Q. Did you make that answer yesterday; I will repeat it again: 'A. He gave me the information that I filed it'; do you remember making that answer yesterday? A. I must have it if it is in the record.

Q. If you made that answer what did you mean by it?

Mr. Bleakley: Now, if your honor please, I object to counsel trying to impeach his own witness, contradict the testimony that he gave yesterday.

Mr. Fanelli: I am not trying to do that; this is something that I had omitted to ask him about. I had a note on it and my assistants tell me that that was not the answer that was made yesterday; they have their notes and I want to clear it up.

Mr. Bleakley: It is funny we heard the testimony as he read it and obtained a copy of it from the stenographer within 15 minutes after the answer was given.

The Court: I will permit you to clarify it.

Mr. Bleakley: I respectfully except.

Mr. Fanelli: And that is my only purpose, to clarify it.

Q. If you made that answer, what did you mean by it? A. I mean that I know that you asked me did I file the certificate and I told you that I did and you also asked me did I sign the certificate and I told you I did; you did not tell me that I filed it.

Q. That is what I want to bring out. Did I at any time— A. No, you did not at any time tell me that I filed the certificate."

The reading of this excerpt shows plainly that the witness' attention was merely called to an answer he had given on cross examination and he was given an opportunity to clear up his apparent contradiction brought

out on the cross examination. By his own testimony on the witness stand the witness then proceeded to correct what was recorded as his testimony and to give what he now says is the truth about the same matters on which he had been cross examined.

This method of questioning is held proper by all the authorities, and no case that the petitioner cites applies to this situation.

The principle as set forth in Wigmore on Evidence, 3rd ed. Vol. 3 at page 737, is as follows:

> "§ 1044. In general. In accordance with the logical principle in Relevancy (ante, § 34), the impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it. The contradictory statement indicates on its face that the witness has been of two minds on the subject, and therefore that there has been some defect of intelligence, honesty, or impartiality on his part; and it is conceivable that the inconsistency of the statements themselves may turn out to be superficial only, or that the error may have been based not on dishonesty or poor memory but upon a temporary misunderstanding. To this end it is both logical and just that the explanatory circumstances, if any, should be received."

To the same effect is the statement of the rule in Wharton's Criminal Evidence in Vol. 3, Section 1336 at page 2216:

> "If a witness is prejudiced before the jury by testimony developed on his cross-examination, he may, on re-examination, remove the unfavorable impression by pertinent explanation."

And also at Section 1338, page 2218:

> "* * * So, a witness may, at the discretion of the court, be permitted to return to the stand after dismissal, to correct or change testimony previously given by him through error, mistake, or oversight, even before the close of the examination in chief."

The cases cited by the petitioner correctly state the general propositions of law that a party may not impeach his own witness by proving through another witness that the impeached witness had made a prior contradictory oral statement, or the situation where the People introduces evidence of oral statements to corroborate testimony of a witness on the stand where no attack upon the witness has been made upon the ground that his testimony is of recent contrivance.

Petitioner has cited at pages 5 and 23, the case of *Bullard* v. *Pearsall,* 53 N. Y. 230. An examination of this case points up the differing situation and announces the rule which is properly applicable to permit the examination of the witness, which was had in this case. The court there distinguishes between calling to the witness' attention previous statements made by him and the proof of such prior oral statements by other witnesses if the impeached witness should deny making the previous statements. The court said in part, at 53 N. Y. 231:

> "It is only evidence offered for the mere purpose of impeaching the credibility of the witness, which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken and to induce him to correct his evidence, should not be excluded simply because they may result unfavorable to his credibility."

The rule is obviously even stronger in favor of admissibility where as in this case the witness is not confronted with a previous oral statement and asked whether he made such a statement but where the portion of his cross examination is recalled to him and without being confronted by the extra-judicial statement, he corrects the recorded testimony on cross examination and affirms on the witness stand that the answers he now gives are a true statement of the facts. It was the defendant's counsel who first inquired into the subject of the pre-grand jury conference, and it was proper to clear up any misunderstanding about the testimony relating to the same subject matter.

In *People* v. *Buchanan*, 145 N. Y. 1, the court discussed the proper rule applicable to the re-direct examination of a witness who has been questioned on cross examination about previous oral statements. This was a murder case and the witness testified as to the health of the deceased but was cross examined as to the details of the conversation he had had with the coroner, including questions relating to the existence of a Will or a suggested use of poison. On re-direct examination he was asked to give the conversation that he had had with the coroner. This re-direct examination is held proper and the court states the general rule applicable to the instant case at 145 N. Y. 24, as follows:

> "If the defendant chose to open an inquiry as to a conversation between the witness and the coroner, it was proper enough and just that the jury should be placed in possession of what the conversation actually was. I understand the rule to be that a witness may be re-examined by the party calling him upon all topics on which he has been cross examined, for the purpose of explaining any new facts which came out; but the re-examination must be confined to the subject matter

of the cross examination. He may be questioned to show the meaning of his expression, or of his motive in using them (1 Starkie on Evid. *208; Clark v. Vorce, 15 Wend. 193, 196). Even if the cross examination has been as to facts not admissible in evidence, the rule seems to be that the witness may be re-examined as to evidence so given (1 Greenl. on Evid. sec. 468; 2 Phillips on Evid. *973; Blewett v. Tregonning, 3 Ad & El. 554.)"

The rule is also illustrated in *People* v. *Zigouras,* 163 N. Y. 250, where it was held that the same principle is applicable to re-direct examination of witnesses for the defense. On cross examination, the People had brought out that one of the defense witnesses had had some trouble with the deceased. Re-direct examination was permitted to explain what the trouble was. The court stated at 163 N. Y. 255, that the explanation might "have restored the direct evidence to its original force, and possibly have increased its force."

A discussion of only one of the cases cited by petitioner should be helpful in illuminating the different factual situation in the instant case. In *People* v. *Purtell,* 243 N. Y. 273, a witness failed to identify a defendant, and the District Attorney cross-examined him regarding the previous statements he had made. The witness, however, denied that he had made certain remarks to the defendant which would throw some light upon the certainty of his prior identification. The District Attorney was permitted to call a detective to show what the witness had actually said to the defendant at the time of the prior identification. The court holds improper, the use of this detective to testify as to the previous oral statement of the witness. But it cites *Bullard* v. *Pearsall, supra,* and also to distinguish between the situation in the *Purtell* case itself, the court also cites at 243 N. Y. 281, *Hickory*

v. *U. S.*, 150 U. S. 303, for the same rule that respondent has previously quoted from *Bullard* v. *Pearsall, supra;* that a witness may be interrogated as to previous statements in order to induce him to correct his testimony. If Balog had persisted on re-direct in stating that the District Attorney had told Balog that Balog has filed the certificate then, of course, any previous oral statement to the contrary would have been inadmissible, and his sworn testimony before the Grand Jury would have been the only method of impeachment. The witness, however, made the correction himself and he had not been in any way prompted nor had he known before being recalled to the stand what the subject matter and the questioning was to be other than there was a point to be cleared up (966-969). The claim of "coaching" is without any basis.

The court's ruling permitting clarification of the matters brought out on cross examination was proper.

POINT III

The witness Balog was not an accomplice.

Again this same argument was considered by the Court of Appeals and the petitioner's position here was unanimously rejected.

The witness Balog had been asked to sign his name by the defendant Sullivan who had already signed the fictitious name of "C. J. Arnold" (2641). The petitioner's counsel conceded at the trial that Balog was not an accomplice on the second count of the indictment which charged forgery (3333). On the other two counts, the uttering of a forged instrument and the filing instrument to be false and forged, there is no evidence in the entire record that Balog had any guilty knowledge of the fact that the defendant had committed a forgery. In all cases in the State of New York a person cannot be an accom-

plice unless he could be found guilty if he were on trial for the crime charged against the defendant (*People* v. *Cohen,* 223 N. Y. 406, 424-426; *People* v. *Youlio,* 243 N. Y. 519).

A claim is made throughout the petition and the supporting brief (see p. 4) that the district attorney at the trial had conceded that Balog was an accomplice but again the folios cited merely show the district attorney had said that the witness Balog committed no crime because the witness had signed his own name and was merely a tool of the defendant Sullivan (3523-3526, 882-883), and for some reason the petitioner cites folio 3484 as proof that the witness Balog was given immunity but it is clear that the reference there is to the bookmaker Arnold and not to Balog.

POINT IV

No substantial question is presented.

Respondent respectfully submits that the petitioner was convicted after a trial in which his guilt "is palpable and convincingly established in this record" (4062), and that petitioner's claims of error cannot be upheld. But even if the Courts of New York State had somehow departed from the precedents established, there would be no constitutional question presented but merely an affirmance of the conviction by the highest court which involved the construction and the application of the statutes of the State of New York to the facts in this record.

Jurisdiction of this court is invoked under § 1257 (3) of Title 28, U. S. C. A. The court has no jurisdiction where a fictitious federal question is involved (*Miller* v. *Sacramento, etc. Drainage Dist.,* 256 U. S. 129). Petitioner's argument in substance is that the New York Court of Appeals is wrong, and that the court acted con-

trary to its own previous decisions. Such an argument presents no question reviewable by this court (*Patterson* v. *Colorado,* 205 U. S. 454, 460). Petitioner does not attack the validity of the state statutes, but merely their construction by the highest state court as applied to these facts, and this court will not review that construction (*Musser* v. *State of Utah,* 333 U. S. 95, 98; *Madden* v. *Commonwealth of Kentucky,* 309 U. S. 83).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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